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U.S. Citizenship
and Immigration
Services

D2

FILE: EAC 03 012 52797 Office: VERMONT SERVICE CENTER Date: MAY 21 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant that seeks to employ the beneficiary as a restaurant manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position failed to qualify as a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a restaurant manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the

director's request for evidence. According to this evidence, the beneficiary would be in charge of all operations, and he will perform duties that entail, in part: hiring, firing, and supervising employees; contacting suppliers and ordering supplies; promoting the restaurant; designing the layout of the restaurant and its equipment; estimating food and beverage costs and requisitions; conferring with food preparation and other personnel to plan menus and related activities; investigating and resolving food quality and service complaints; and handling all financial matters. The petitioner stated that the beneficiary is qualified for the position because the combination of his academic training and experience are the equivalent of a bachelor's degree in business administration. Furthermore, the petitioner claims that the beneficiary's fluency in the Thai and English languages make him uniquely suited for the position.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by a restaurant manager, and that the *Handbook* reports that a bachelor's degree in a specific specialty is not required for this position.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel states that Royal Thai Restaurant had an H-1B petition approved on the beneficiary's behalf. Counsel claims that the beneficiary holds the equivalent of a bachelor's degree in business administration awarded by a U.S. college or university. Counsel contends that the petitioner's salary for the position is commensurate with the attainment of a bachelor's degree, and that the position's duties require specialized knowledge of business administration that only a college graduate or seasoned professional would possess. Counsel emphasizes the petitioner's projected revenue and its relationship to the Royal Thai Restaurant. Counsel contends that the beneficiary has experience in a restaurant environment. Furthermore, counsel claims that the petitioner is not a food service and restaurant chain. Rather, it is an authentic Thai restaurant with a special niche. Referring to a letter from a competitor [REDACTED], counsel states that the norm is to require a bachelor's degree or its equivalent in business administration for a restaurant manager position; counsel claims that the [REDACTED] attested that it normally requires a degree or its equivalent. According to counsel, Royal Thai also requires a bachelor's degree in business administration.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

As previously mentioned, CIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. A petitioner must establish that the position realistically requires knowledge, both theoretical and applied, which is almost exclusively obtained through studies at an institution of higher learning. The depth of knowledge and length of studies required are best typified by a degree granted by such an institution at the baccalaureate level. It must be demonstrated that the position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration, without further specification, does not establish eligibility. The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *Matter of Michael Hertz Assoc.* 19 I&N 558, 560. In the instant petition, the petitioning entity requires a bachelor's degree in business administration without specifying a particular emphasis. Consequently, this requirement would be insufficient to establish

that the proffered position qualifies as a specialty occupation because business administration is not a specialized field of study.

Another of counsel's assertions is that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the approval notice submitted by counsel is not sufficient to enable the AAO to determine whether the instant petition is parallel to the approved petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

When determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation. A review of the *Handbook* discloses that the director correctly determined that the beneficiary's duties parallel those performed by food service managers. For example, the *Handbook* explains that food service managers recruit, interview, hire, and fire employees; select successful menu items; on a daily basis, estimate food consumption, place orders with supplies, and schedule the delivery of fresh food and beverages; arrange for equipment maintenance and repair; coordinate services such as waste removal and pest control; oversee employee training; schedule the work hours of employees; and supervise the kitchen and dining rooms, such as overseeing food preparation and cooking, and investigating and resolving customers' complaints about food quality or service. In addition, the *Handbook* reports that, in small establishments, food service managers keep records of the hours and wages of employees, prepare the payroll, and fill out all paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws.

With respect to the qualifications, training, and advancement of food service managers, the DOL states that food and restaurant chains prefer to hire people with degrees in restaurant and institutional food management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions, the *Handbook* explains, are filled by promoting experienced food and beverage preparation and service workers. The *Handbook* also mentions that most restaurant chains

and food service management companies have rigorous training programs for management positions. Thus, according to the *Handbook*, candidates for the offered position would not be required to possess a bachelor's degree in a specific specialty. Accordingly, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to the letters from Piko's Restaurant and the petitioner. Counsel's evidence, however, is insufficient to establish the second criterion. The January 9, 2003 letter from Piko's Restaurant is silent about the duties of its position; thus, the AAO cannot determine whether the position is parallel. In addition, counsel's evidence of only one employer's practice - Piko's Restaurant - is a woeful demonstration of an industry-wide standard. The petitioner's January 15, 2003 letter avers that a bachelor's degree in business administration is a standard industry requirement for a restaurant manager position. As previously discussed, a bachelor's degree in business administration is insufficient to establish that the proffered position qualifies as a specialty occupation because business administration is not a specialized field of study.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Although the petitioner claims that it normally requires a degree or its equivalent for the position, there is no evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Moreover, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. According to counsel, the duties of the proffered position are complex, requiring a bachelor's degree in business administration. Again, as already discussed above, a bachelor's degree in business administration is insufficient to establish that the proffered position qualifies as a specialty occupation because business administration is not a specialized field of study.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.